

760 CMR 19.00: FACILITIES CONSOLIDATION FUND PROGRAM

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[19.01: Scope, Purpose, and Applicability](#)

(1) The Facilities Consolidation Fund (FCF) program was created by St. 1993, c. 52, §2 (budget line item 4000-8200), as modified by St. 1993, c. 493, §15, and further modified by St. 1993, c. 494, §4 (Original FCF Legislation), which authorized the Department of Housing and Community Development to use certain general obligation bond funds for the creation of Community-Based Housing for Mentally Ill and Mentally Retarded persons. Pursuant to St. 2002, c. 244, §§15-19, inclusive (FCF 2 Legislation), approved August 10, 2002, certain terms of the FCF program were modified. References herein to the " FCF Legislation" refer to the Original FCF Legislation, as so modified by the FCF 2 Legislation, and as it may be further amended, supplemented and replaced from time to time. The FCF program provides loans for Eligible Projects developed by one or more Non-Profit Corporations, or organizations in which one or more Non-Profit Corporations have a controlling financial or managerial interest.

(2) 760 CMR 19.00 replaces 760 CMR 50.00 and is effective upon promulgation. 760 CMR 19.00 does not change the rights and obligations of an Owner of a project on which construction began before December 13, 1996. The provisions of Regulatory Agreements entered before December 13, 1996 shall remain in full force and effect according to their terms.

(3) In the event of any actual or potential inconsistency between or among the provisions of these Regulations, the applicable FCF Legislation, the Facilities Consolidation Plan, and/or the FCF Guidelines (both as hereinafter defined), and the loan documents evidencing a loan made under the FCF program, such provisions shall be interpreted, to the extent reasonably possible, so as to reconcile any such inconsistencies. If such provisions cannot reasonably be reconciled, the provisions of the applicable FCF Legislation, the Facilities Consolidation Plan, these Regulations, the FCF Guidelines, and such loan documents, in the foregoing order of priority, shall control.

19.02: Definitions

Application - An application for a loan, in the format specified by the FCF Guidelines, including a description of a proposed Project, all financing sources, and all other matters required by the FCF Guidelines.

Community-Based Housing - A non-institutional Residential Housing Development, or unit therein, that is reserved for clients of EOHHS who have been found eligible for such housing by DMR or DMH, of one of the following types:

(a) Group Home or Single Room Occupancy Housing - a residence that provides separate sleeping facilities for each resident. The building must also provide facilities for living, eating, cooking and sanitation for all residents; however, these facilities may be shared; or

(b) Scattered Site Housing - A residence that provides separate facilities for living, sleeping, eating, cooking and sanitation for each resident.

DCAM - The Division of Capital Asset Management and Maintenance of the Executive Office of Administration and Finance (which term shall encompass its predecessor, the Division of Capital Planning and Operations).

Deferred Payment Loan (DPL) - A loan secured by a mortgage on a Project which defers the repayment of principal and interest (if any) for a defined or undefined period of time.

Developer - The developer of an Eligible Project, and its permitted successors and assigns. The Developer may also be the owner of the Eligible Project, but need not be the owner, so long as (i) such Developer has control of the site on which the Eligible Project is located pursuant to a ground lease or other instrument acceptable to DHCD, in its discretion, for a period at least equal to the term of the applicable FCF loan; and (ii) the owner assents to the developer's execution, delivery and recording of the Land Use Restriction and executes and delivers the Land Use Restriction and/or such additional documentation as DHCD may require, in its discretion, regarding the rights of DHCD and/or any Financial Intermediary with respect to the site .

DHCD - The Department of Housing and Community Development (including, where applicable, its predecessor, the Executive Office of Communities Development).

DMH - The Department of Mental Health of the Executive Office of Health and Human Services.

DMR - The Department of Mental Retardation of the Executive Office of Health and Human Services.

Eligible Project/Use (Project) - The acquisition, construction, renovation and/or rehabilitation and operation of Community-Based Housing for Mentally Ill or Mentally Retarded persons that meets the requirements of 760 CMR 19.03.

EOHHS - The Executive Office of Health and Human Services.

FCF Guidelines - Guidelines issued by DHCD setting out, clarifying and further explaining 760 CMR 19.00, program policy and procedure, as such guidelines

may be amended, supplemented or replaced from time to time. The FCF Guidelines shall apply to all FCF financing programs (subject always to 760 CMR 19.01(3)).

Facilities - Institutional facilities owned or operated by the Commonwealth for either Mentally Ill or Mentally Retarded persons, which are more specifically identified in the Report of the Special Commission.

Facilities Consolidation - The closure and consolidation of Facilities and the reorganization of community service systems by the Commonwealth in accordance with the Report of the Special Commission.

Facilities Consolidation Plan - The December 1993 Facilities Consolidation Plan prepared by the Secretary of EOHHS, which has been reviewed and approved by DHCD and filed with the Secretary of Administration and Finance of the Commonwealth and the House and Senate Ways and Means Committees (as it may be amended, supplemented or replaced from time to time).

Financial Intermediary - The Community Economic Development Assistance Corporation, the Massachusetts Housing Finance Agency, the Massachusetts Development Finance Agency (formerly the Massachusetts Government Land Bank), a local housing authority, a redevelopment authority, or a community development corporation, which serves as the conduit for FCF loan funds and is not a member of the development team.

Financially Feasible Project - An Eligible Project that is likely to secure binding financing commitments from other funding sources which, together with the FCF funds, total the budgeted amount necessary to develop and operate the Project.

Firm Financing Commitment - A binding written commitment to fund an FCF loan, summarizing the terms and conditions of such loan, which will be issued when the conditions of the conditional commitment letter (if any) have been satisfied.

Gross Cash Expenditures - All expenses paid out by the Project, including all payments of principal and interest (if any) and any other debt service on outstanding loans, all operating and maintenance expenses, and reasonable payments into capital and operating reserves for the Project.

Gross Cash Receipts - All cash collections received by the Project from all sources, with the exception of documented contributions, donations and grant proceeds.

Land Use Restriction - An agreement by Developer (and, as required by DHCD, by the owner of the site on which the Eligible Project is located, if other than the Developer), running with the land and restricting a Project to use as Community-Based Housing for Mentally Ill or Mentally Retarded persons. Such agreement, as further described in 760 CMR 19.04(2)(f), shall include such terms and conditions as are imposed under the FCF Legislation and/or the FCF Guidelines or are otherwise required by DHCD, and shall be recorded and/or registered in the Registry of Deeds and/or Registry District of the Land Court where the Project is located.

Lease-Purchase Agreement - An agreement between the Developer and DCAM, as further described in 760 CMR 19.04(4), under which DCAM leases an Eligible Project for the benefit of DMR or DMH for thirty (30) years. The Lease-Purchase Agreement may be for a shorter period if the DCAM Commissioner, in consultation with DMR or DMH, as applicable, determines that the amortization of such agreement for a shorter period would be as cost-effective as a 30-year term. The Lease-Purchase Agreement may be extended for up to ten (10) years, if the DMR and DMR commissioners recommend an extension to DCAM to satisfy repayment of an FCF loan. The Lease-Purchase Agreement may incorporate a Title Transfer Agreement.

Mentally Ill - A person DMH determines is eligible to receive services and subsidies provided by DMH.

Mentally Retarded - A person DMR determines is eligible to receive services and subsidies provided by DMR.

Non-Profit Corporation - A corporation organized under M.G.L. c. 180, which may also be required by DHCD to be a 501(c)(3) organization under the Internal Revenue Code at the time of Application or loan closing. To qualify as a Non-Profit Corporation for purposes of the FCF program, no member, shareholder, officer or employee of the corporation or its board of directors can profit, in any way, from the FCF assistance or from the Project. The Non-Profit Corporation must also demonstrate, to the satisfaction of DHCD, the capability of managing all of its responsibilities to the Project.

Report of the Special Commission - The report entitled "Actions for Quality Care" dated June, 1991, together with the subsequent report dated May, 1992 by the Governor's Special Commission on the Consolidation of Health and Human Services Institutional Facilities in the Commonwealth (as it may be amended, supplemented or replaced from time to time).

Residential Housing Development - Property which is predominantly used for housing and is in compliance with applicable laws and ordinances.

Title Transfer Agreement – An agreement reflecting the option granted by the Developer/owner for the Commonwealth to acquire title to the Project (a) when the FCF loan becomes due and payable; or (b) upon the expiration of a Lease-Purchase Agreement with DCAM, as applicable (except that the commissioners of DMR and DMH may recommend that title be transferred to the provider of housing or other services at the Project, subject to a Land Use Restriction, in accordance with the requirements of the FCF Legislation). The option shall be granted by the Developer to DCAM, as agent for the Commonwealth. The Title Transfer Agreement shall run with the land, and shall be recorded in the appropriate Registry of Deeds or Registry District of the Land Court at the closing of the FCF loan, or at the time of the execution and delivery of the Lease-Purchase Agreement, as applicable (or upon the earlier of the foregoing events,

if an FCF loan is being made for an Eligible Project that is also (or will also be) the subject of a Lease-Purchase Agreement). If an exception described in 760 CMR 19.04(2)(i) applies, no Title Transfer Agreement shall be required. When an FCF loan is made in conjunction with a Lease-Purchase Agreement, DHCD may require that the Title Transfer Agreement be incorporated into the Lease-Purchase Agreement.

Total Development Costs - Total hard and soft costs of developing an Eligible Project, including, the costs to purchase, design, construct and finance the Project.

19.03: Eligible Projects/Uses

An FCF loan can be made only for a Residential Housing Development that is a Financially Feasible Project and which:

- (1) complies, or upon completion will comply, with the FCF Legislation and all other applicable federal, state or local requirements, including the Americans with Disabilities Act of 1990, and 105 CMR 410.00;
- (2) in accordance with the Facilities Consolidation Plan, provides Community-Based Housing for Mentally Ill or Mentally Retarded persons, all of whom are either:
 - (a) current or former residents of Facilities who have been adversely affected by the Facilities Consolidation Plan;
 - (b) awaiting Community-Based Housing due to historically high costs needed to maintain Facilities, as certified by DMR or DMH in connection with an Application; or
 - (c) living in Community-Based Housing but are underserved due to historically high costs needed to maintain Facilities, as certified by DMR or DMH in connection with an Application.

(3) is developed and owned by one or more Non-Profit Corporations (or by an entity or entities in which one or more Non-Profit Corporations have a controlling financial or managerial interest); and

(4) has been approved by DMR or DMH prior to submission of an Application, as evidenced by the DMR or DMH letter of certification described in the FCF Guidelines.

19.04: Types of Loans, Loan Terms, and Loan Conditions

(1) Loan Types - Eligible Projects may receive FCF assistance in three areas: acquisition loans, construction/rehabilitation loans, and permanent loans. All FCF loans are structured as Deferred Payment Loans (DPL). Developers shall complete the application process in accordance with the FCF Guidelines.

(2) Loan Terms - All loans under the FCF program shall be made upon the following terms and such other terms as are included in the FCF Guidelines and/or DHCD's loan documents:

(a) Loan Proceeds - The proceeds of the loan shall be used solely for the development of the Eligible Project approved by DHCD.

(b) Loan Amount - The amount of any FCF loan granted under the Original FCF Legislation shall not exceed 30% of the Total Development Cost of the Project, and the amount of any FCF loan granted under the FCF 2 Legislation shall not exceed 50% of the Total Development Cost of the Project; provided, however, that DHCD may establish per-unit and per-Project dollar limits in the FCF Guidelines to which the loan would also be subject.

(c) Loan Period - The original term of the loan shall be up to thirty (30) years. At the maturity date, the term may be extended for additional periods of up to ten (10) years each at the discretion of DHCD, with the consent of the owner, if the Project continues to meet the FCF

requirements and the requirements for an extension under the FCF Legislation, the FCF Guidelines, and the loan documents for such loan have been satisfied (including, with respect to loans granted under the FCF 2 Legislation, DHCD's determination, in consultation with EOHHS, that there still exists a need for the Community-Based Housing and that there is continued funding available for the provision of services to the Project, and the continuing applicability of the Land Use Restriction for the duration of the loan term, as so extended).

(d) Interest Rate - The interest rate shall be set by DHCD in consultation with the Treasurer of the Commonwealth. To the extent required under the FCF Legislation, the interest rate shall be equal to the rate anticipated to be paid by the Commonwealth for bonds issued pursuant to [§6] of St. 1993, c. 494, as required by the FCF Legislation.

(e) Loan Payments - Because all FCF loans are structured as DPLs, payments of principal and interest (if any) will be deferred for the loan period unless either of the following occurs:

- (i) A Project has Gross Cash Receipts for a fiscal year exceeding Gross Cash Expenditures by 105%; or
- (ii) A Project defaults on the terms of the loan.

Within 45 days after the end of each Project's fiscal year, the owner shall supply DHCD or the Financial Intermediary with the necessary financial statements needed to determine the amount of payment necessary for the period. All amounts paid pursuant to this section shall be applied first to the payment of interest and costs, and then to principal.

(f) Land Use Restriction - The Developer/owner of the Project shall execute and record at the appropriate Registry of Deeds or Registry District of the Land Court a Land Use Restriction. The Land Use Restriction shall only be released:

(i) upon (A) payment in full of all amounts due under the FCF loan (provided, however, that no prepayment shall be allowed under the loan prior to the maturity date as defined in the promissory note for such loan, as such maturity date may be extended from time to time); and (B) if applicable, the written determination by the Secretary of EOHHS, the Secretary of Administration and Finance, and the Commissioner of DMR or DMH, as appropriate, that there is no longer a need to maintain the Project' s use as Community-Based Housing for Mentally Ill or Mentally Retarded persons; or

(ii) upon (A) foreclosure of the subject Project by the holder of a bona fide first-priority mortgage; or, with DHCD' s consent, a bona fide mortgage that was senior to the lien of the FCF mortgage loan at the time of loan closing, or to which the FCHF mortgage loan has been duly subordinated; and (B) if applicable, a certification by the Secretary of EOHHS as to the inability of EOHHS to locate a purchaser or manager for the Project who can maintain the Eligible Use of the Project. The failure of the Secretary of EOHHS to locate such a purchaser or manager and notify the foreclosing mortgagee of the identity of the buyer or manager, within sixty (60) days prior to such foreclosure sale by the foreclosing mortgagee, shall be deemed to be a certification as described in the preceding sentence. The recording of a sworn affidavit by the foreclosing mortgagee certifying as to the failure to meet this deadline will release the Land Use Restriction, provided that the foreclosure deed is recorded not more than six (6) months after the receipt by the Secretary of EOHHS of the foreclosure notice.

(g) Mortgage Lien - The loan shall be secured by a mortgage lien against the Project, which may be junior only to such senior mortgage liens permitted by DHCD.

(h) Refinancing of FCF Loans - An FCF loan may be refinanced during the term of the FCF loan only in the following cases:

- (i) the refinancing would result in lower costs to the Commonwealth for the Project; or
- (ii) the refinancing is necessary to effect extraordinary repairs or maintenance which have been approved by the Commissioners of DCAM, DMH or DMR (as appropriate), and the House and Senate Ways and Means Committees of the Commonwealth;

and the refinanced loan is due and payable on or before the maturity date of the original FCF loan (as such maturity date may have been extended).

(i) Title Transfer Agreement - A Title Transfer Agreement shall be required for each FCF loan, unless one or more of the following shall apply:

- (i) mortgage amortization expenses for the Project are not paid directly or indirectly through reimbursements or rates paid by the Commonwealth on behalf of Mentally Ill or Mentally Retarded residential clients of DMR or DMH; or
- (ii) where income for the Project is from an agreement between the owner of the Project and DCAM, DMR or DMH, and the agreement is:

- (A) for a term not to exceed five years; and
- (B) consistent with law governing contracting for Community-Based Housing services; and
- (C) consistent with the provisions of the FCF Legislation.

A Land Use Restriction shall be duly recorded and/or registered, as described in 760 CMR 19.04(2)(f), regardless of whether or not the Property is subject to a Title Transfer Agreement, or qualifies for one of the foregoing exceptions.

When DCAM exercises the Commonwealth's right to take title to a Project under a Title Transfer Agreement and the title is transferred, the Director of DHCD may determine that the FCF loan has been satisfied in full, provided that the loan is not in default.

(j) Facilities Consolidation Plan - All loans must be in accordance with the Facilities Consolidation Plan.

(k) EOAF Approval - The Secretary of the Executive Office of Administration and Finance must approve, in advance, all expenditures under the FCF program.

(3) Use of FCF Loan Proceeds for Refinancing Outstanding Loans - FCF loans may be made to refinance an outstanding mortgage loan to an Eligible Project if:

(a) the Eligible Project was in existence on or before May 21, 1993, and the Eligible Project was purchased or developed in accordance with the Report of the Special Commission for former residents of:

(i) the Belchertown State School, or

(ii) the Norfolk Street Project in Cambridge, Massachusetts; or

(b) the Director of DHCD determines that the making of an FCF loan to the Eligible Project will allow for substantial change in the residential population, the physical structure, or the service program such that the completed Project can be considered a new Project.

(4) Lease-Purchase Agreement - An FCF loan may be made to an Eligible Project for which DCAM has agreed to enter into a Lease-Purchase Agreement

with the provider of Community-Based Housing for clients of DMR and DMH. The terms of the Lease Purchase Agreement shall be as prescribed by DCAM, consistent with the FCF Legislation and the provisions of 760 CMR 19.00. Requests for assistance under the FCF program shall be subject to the underwriting and selection requirements of DHCD. Of those FCF loans involving a Lease-Purchase Agreement, 65% of all Projects approved for clients of DMR must be for new construction, and 35% must be for the acquisition and rehabilitation of existing structures. In addition, 20% of all Eligible Projects approved for clients of DMH must be for new construction, and 80% must be for the acquisition and rehabilitation of existing structures. In no event may the needs of the clients of DMR or DMH be compromised by these selection criteria, nor may the cost of a successful Application be uncompetitive with other proposals under consideration.

(5) Application Process - DHCD shall specify application procedures for FCF loans in the FCF Guidelines. DHCD reserves the right to hold competitive funding rounds for FCF loans.

19.05: Statutory Exemptions

Loans provided under the FCF program are exempt from the following provisions of state law:

- (1) M.G.L. c. 111, §§ 25(C) through 25(G), and any other general or special law requiring determination of need;
- (2) M.G.L. c. 7, §§ 38A½ through 38O;
- (3) M.G.L. c. 30, § 39M; and
- (4) M.G.L. c. 149, §§ 44A through 44J.

19.06: Waiver by Director of DHCD

If any provision in the FCF Legislation, these Regulations or the FCF Guidelines or any other requirement of the FCF program would preclude the use of federal funds that would otherwise assist in meeting the goals of the FCF program, the Director of DHCD may, as provided in the FCF Legislation, modify, waive or negotiate such modifications to the rules as may be required to allow the use of such federal funds; provided, however, that the interests of the Commonwealth shall remain protected. In the event that the terms of repayment detailed in the FCF Legislation, these Regulations, the FCF Guidelines or the loan documents evidencing an FCF loan would cause a project authorized by the FCF Legislation to become ineligible to receive federal funds which would otherwise assist in the development of that project, the commissioner may waive the terms of repayment which would cause the project to become ineligible. The Director may also waive any provision of 760 CMR 19.00 not required by the FCF Legislation, if the Director determines that such action is advisable and in the public interest.

19.07: Reporting Requirements

Within thirty (30) days after the end of each calendar quarter, DHCD and EOHHS jointly shall submit to the House and Senate Committees on Ways and Means a report detailing all financial activities under the FCF program during the calendar quarter just ended. Such report shall include descriptions of all loan agreements, expenditures, encumbrances, debt issuances and debt service incurred.

REGULATORY AUTHORITY

760 CMR 19.00: St. 1993, c. 52 (budget line item 4000-8200), as modified by St. 1993, c.493, §15, and St. 1993, c. 494, §4, and as further modified by St. 2002, c. 244, §§15-19, inclusive; M.G.L. c. 23B and c. 6A.